BEFORE THE WASHINGTON UTILITIES
AND TRANSPORTATION COMMISSION

In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996	)	Docket No. UT-003022
In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996	)	Docket No. UT-003040

AT&T'S COMMENTS ON THE LIBERTY CONSULTING GROUP'S QPAP REPORT

I. INTRODUCTION

AT&T notes that it has been an active participant in both the "ROC PEPP Collaborative" as well as proffering the direct and rebuttal testimony of AT&T Senior Policy Witness John Finnegan in hearings in front of Liberty Consultant John Antonuk (hereinafter "Antonuk") during the weeks of August 13, 2001 and August 27, 2001. AT&T also filed "main briefs" on September 13, 2001 and "reply briefs" on September 20, 2001. As Antonuk noted, the hearings were forced to culminate in part because "the PEPP collaborative not only left many issues unresolved, but its progress was halted abruptly (at Qwest's doing) – just two days after Qwest submitted a new PAP proposal. Moreover, the QPAP filed by Qwest in these proceedings contains material changes for that last one provided to the PEPP collaborative."[1] Thus, much of the QPAP language at issue was proffered exclusively by Qwest with CLEC's attempts to change such language being rebuffed because Qwest terminated the collaborative process.

---

[1] The Liberty Consulting Group QPAP Report (October 22, 2001) at p.3. (hereinafter "Antonuk Report").

As Qwest basically walked away from the collaborative process while it was in mid-stream, AT&T appreciates the opportunity that the Washington Utilities and Transportation Commission (the "Commission" or "Washington Commission") provided in order to address the various significant issues and flaws related to the QPAP. However, a careful review of the resulting Antonuk report will demonstrate that regarding various essential issues, Antonuk either and/or in the aggregate:

1) Ignored relevant evidence;
2) Ignored or misapplied the relevant standard of review;
3) Ignored performance assurance plan precedent from other jurisdictions and/or the Federal Communications Commission;
4) Relied on facts or argument not in evidence; and/or
5) Made changes that are even more limiting and ILEC biased than the corresponding sections of the QPAP that Qwest had proffered in the Multi-State QPAP Hearings.

Accordingly, although certain recommendations in the Antonuk report alleviate a few of AT&T's concerns, AT&T still has significant concerns that the QPAP, with the changes recommended by Antonuk, lowers "the bar" to a level never before contemplated by any state commission or the Federal Communications Commission (hereinafter "FCC"). It is important to note that immediately subsequent to the Antonuk Report, the Utah Division of Public Utilities staff issued its report (*see* Exhibit A attached) *sua sponte* addressing many of the Antonuk report misinterpretations and inadequacies. Unless expressly articulated below, AT&T endorses the changes recommended by the Utah Staff.

As AT&T has already commented about the QPAP proffered by Qwest, it incorporates those comments and briefs by reference including "AT&T and Ascent's Verified Comments on Qwest's Proposed Performance Assurance Plan" filed with the

Commission on July 27, 2001, "AT&T's Brief Related to the QPAP" filed on September 13, 2001, and "Reply Briefs Related to the QPAP" filed on September 20, 2001.

As such filings are incorporated by reference, AT&T herein focuses on its issues with the Antonuk report.

II. STANDARD OF REVIEW

In reviewing the Antonuk report, it is clear that he has deviated from the FCC and other state commissions' standards of review. It is obviously essential that a hearings officer apply the proper standard, because logically if the wrong standard is utilized, the result is also incorrect. Thus, the relevant commissions should utilize the proper FCC and state commission precedented standard of review when considering any decision that Antonuk has made.

The proper standard is as follows: "The public interest analysis is an independent element of the statutory checklist and, under normal canons of statutory construction, requires an independent determination."[2] As part of a public interest determination, the FCC has looked at if "a BOC would continue to satisfy the requirements of section 271 after entering the long distance market."[3] In doing so, the FCC has determined that effective performance monitoring and enforcement mechanisms (i.e. a performance assurance plan) would constitute probative evidence as to public interest being met in the

[2] *Id.* at ¶ 417.
[3] *Id.* at ¶ 420.

particular state.[4] Thus, as Qwest has stated, Qwest is proffering its QPAP to assure the FCC that it would continue adhering to the requirements of 271 post-entry.[5]

On page 4 of his report, Antonuk correctly verifies that there are five factors that the FCC has utilized in its "zone of reasonableness test" articulated by the FCC in the Bell Atlantic New York Order.[6] Antonuk further correctly asserts that utilizing the Bell Atlantic New York Order, "(the) task is not to decide how to increase incentives, but to decide upon the sufficiency of those proposed, which includes at least a full consideration of their comparability with those already reviewed by the FCC."[7]

However, Antonuk then deviates from FCC mandate including the five factors considered in the zone of reasonableness test and adds factors ("considerations") of his own including:

- Does the plan provide adequate compensation for actual harm for which CLECs could reasonably expect to be compensated if their relationship with Qwest were more typical of commercial arrangements of similar size, complexity, and mutual risk and opportunity?
- Will the plan provide the incentive in a manner that does not place any more strain than is necessary on the sound principle that damages should bear a reasonable relationship to harm caused?
- Do the incentive aspects of the plan (i.e., those that go beyond compensating CLECs for actual harm) impose a price on in-region, InterLATA entry that it would be irrational for a BOC to pay for the privilege of such entry, recognizing that it is the expected value of potential payments that matters, not some theoretical maximum payment which is likely to never be realized?[8]

---

[4] *Id.*
[5] *Id.*
[6] *See Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York,* Memorandum Opinion and Order, CC Docket 99-295 at ¶ 8 (December 22, 1999) (Bell Atlantic New York Order). Antonuk cites that such a test comes from Qwest Initial PAP Brief at page 2. *See* Footnote 6 at p. 4. It should be clarified that it is not a Qwest test but an FCC test.
[7] Antonuk Report at p. 5.
[8] Antonuk Report at p. 6.

Antonuk then indicates that he expressly did not consider "whether greater burdens on Qwest would increase its incentives to comply with its service obligations" indicating "(t)he answer to that question is as irrelevant as it is self-evident. In no fathomable commercial setting is that question material to the mutual agreements that come to fruition between vendors/suppliers and customers. Making it relevant here is not only fantastical, it is beyond any rational conception of fairness and propriety."[9] The Utah Division of Public Utilities has stricken this concerning language[10] and for reasons stated below, AT&T would request that the Commission do the same.

The most obvious problem with Antonuk's standard of review is that it does not provide "a clearly articulated standard" in violation of the FCC five-prong test. In sum, it is difficult to understand what Antonuk's additional and ethereal factors and corresponding commentary even mean, let alone apply such factors.

More importantly, Antonuk's additional factors, especially the rejection of increased incentives, substantially deviate, and contradict the relevant FCC standard of review as applied by various states. As articulated by the Colorado Public Utilities Commission in their Order Regarding the Colorado Performance Assurance Plan,[11] "(t)he FCC requires a plan for identifying and penalizing any anti-competitive behavior that may take place after the ILEC has entered the long distance market. The Act directs the FCC to correct any ILEC behavior that subsequently falls short of the Act's Sec. 271 requirements, either by issuing an order, imposing a penalty or revoking the right to provide long distance service. (cite omitted). This corrective action implies ongoing

---

[9] Antonuk Report at p.6.

[10] Exhibit A at p.7.

[11] *See In the Matter of the Investigation Into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Order re: Colorado Performance Assurance Plan, Docket No. 01T-041T, Decision No. R01-997-I (rel. September 26, 2001). (attached as Exhibit B)

monitoring of ILEC behavior either by a federal or state commission or by the ILEC's competition." Thus, this is not a plan created to determine, as Antonuk articulates, what the "toll" should be for a BOC to pay for the privilege of 271 entry or how much "unnecessary strain" is put on the BOC to pay a CLEC "damages".[12] It is an FCC-mandated plan to assure that markets remain open for competition.

Accordingly, the Colorado Public Utilities Commission's commentary in tandem with the FCC's clearly articulated five pronged test, and various elements of the Qwest plan including escalating penalties[13] demonstrate that the plan is an incentive plan with greater "burdens" when the performance is deficient for a longer period of time. In sum, the plan must identify and remedy deficient ILEC performance utilizing the FCC five-prong test. Any other factor identified by Antonuk is irrelevant as well as counterproductive to the goals of the plan and should be disregarded.

III. MEANINGFUL AND SIGNIFICANT INCENTIVE

A. TOTAL PAYMENT LIABILITY

Antonuk indicates correctly that under certain plans, the FCC has indicated that a 36% cap is adequate. However, Antonuk did not adopt the 36% cap. Instead, he implemented an unprecedented and Qwest advantageous cap utilizing "movement principles" unrecognized by any commission or the FCC.[14] These movement principles hardly allow movement upward as it only allows a 4% upward movement after a commission finds that the cap would have been exceeded for the prior 24 months and that "Qwest could have remained beneath the cap through reasonable and prudent efforts."[15]

[12] *See* Antonuk Report at p. 6, 16.
[13] *See* QPAP Table 2.
[14] *See* Antonuk Report at p. 18-19.
[15] *Id.* at p. 19.

Thus, the cap would only be moved **after** CLECs have been denied payments because of the cap for **twenty-four** consecutive months.

The ramifications of such language are tremendous. The chances of Qwest exceeding the monthly cap for twenty-four **consecutive** months are minimal because Qwest, and only Qwest controls its performance.[16] Thus, Qwest could exceed the cap for two months, perform under the cap for two months, exceed the cap for fourteen months, perform under the cap for one month, exceed the cap for twenty-two months, perform under the cap for one month, and exceed the cap for twenty-three months resulting in no movement, and no possibility of movement of the cap upward. Taking into consideration that the CLECs are waiving **all** contractual remedies (and more under Antonuk's new proposal discussed below), this is hardly an equitable solution to the issue of capping performance payments.

This cap must also be reviewed in tandem with the decrease in caps. Antonuk recommends that the cap be decreased (below the FCC threshold of 36%) a maximum of 4% at any one time when a consecutive 24 month period demonstrates that payments made were 8 or more percentage points less than the cap amount for that period, as long as the relevant commission finds "the performance results underlying those payment calculations results from an adequate Qwest commitment to meeting its responsibilities to provide adequate wholesale service and keeping open its local markets."

The downward cap is extremely problematic. First, the FCC has never authorized a plan where the ILEC's total liability was less than 36% of net interstate revenues. Second, as a CLEC is waiving substantial alternative remedies by participating in such a

[16] Qwest could argue that the CLEC or a *force majure* event could alter its performance. However, any such events are excluded under a limitations clause in QPAP § 13.

plan, they should not be put in a position where the ILEC can nullify the possibility of a CLEC receiving remedies in one year because of a BOC's failure to meet the cap in other years. Finally, as CLECs are dropping like dominos, Qwest is actually being rewarded for the lack of competition in the marketplace. This is because when there are fewer CLECs receiving wholesale services from Qwest, there are fewer participants in the QPAP. If there are fewer participants and/or fewer Qwest wholesale services being performed, Qwest payouts, independent of the quality of Qwest performance, will be lower. If Qwest's payouts are lower, Qwest will be able to meet the requirements for meeting the cap.

In sum, a plan that allows for the decrease in a cap for factors independent of, and perhaps with negative correlation to the quality of Qwest performance is not in the public interest. This is especially true when the corresponding increase in penalties has been set so any relief to the CLECs will most likely never occur.

Furthermore, it is curious that Antonuk has even advocated such a proposal. Antonuk indicated that his task was "not to decide on how to increase incentives, but to decide on the sufficiency of those proposed, which includes at least a full consideration of their compatibility with those already reviewed by the FCC."[17] In violation of his own mandate, he has created and advocated a solution that no one, including Qwest, advocated or asked for.

[17] *See* Antonuk Report at p.5.

AT&T notes that both the Utah Division of Public Utilities and the Colorado Public Utilities Commission advocated solutions which are far more balanced, more well thought out and far less Qwest biased than the Antonuk proposal.[18]

The Utah Division of Pubic Utilities Staff raised the cap to 44% base cap based on the finding of the New York Public Service Commission that a 36% cap did not provide adequate incentive to the BOC.[19] The Utah Division of Public Utilities allowed a maximum increase of up to 4 percentage points when the current cap had been exceeded for any consecutive period of 12 months.[20] There is no provision for a decrease of a cap.[21] AT&T agrees with the Utah proposal.

Regarding the recommendation of the Colorado Public Utilities Commission, it is appropriate to note that, although it is separate and distinct from the QPAP, having been created by the Commission and its agents instead of Qwest, Antonuk found the plans to be substantially similar.[22] Tier IX payments under the CPAP are the same as Tier 1 payments under the QPAP. As they provide compensatory payments to the CLECs,[23] they are simply not capped.[24] Other types of payments such as Tier II are capped.[25] "If Qwest payments equal or exceed the annual cap for two years in a row or 1/3 of the annual cap in the combination of two consecutive months," the Commission shall have the authority to open a proceeding and after determining that the meeting of the cap was

---

[18] In fact, even the Qwest hard 36% cap bodes better to the CLECs than the Antonuk solution based on the inequities of when such cap can be raised or lowered.
[19] *See* Exhibit A at p. 13-16.
[20] *Id.* at p. 20.
[21] *Id*.
[22] *See* Antonuk Report at p. 13.
[23] *Id.* at p. 13.
[24] *See* Exhibit B at p. 61. Note that Qwest Witness Carl Inoyue insisted that the Tier IX payments actually were capped. However, Hearings Officer Gifford reaffirmed that this was not the case.
[25] *See* Exhibit B (Plan) at p. 8-9.

performance related, can raise the cap.[26] Of course, as this has been AT&T's consistent advocacy all along, AT&T agrees with the Colorado Commission's proposal.

Also, the Commission should also look at the most recent FCC filings from BellSouth. As copied verbatim from the application, in Georgia and Louisiana, BellSouth writes the plan "exposes it to a total of $336 million in self-executing payments during the first year of its operation. *Varner Ga. Aff.* ¶ 304. This exposure is 44% of BellSouth's net revenue in Georgia in 1999 and thus *exceeds* – as a percentage of net revenue – the exposure that the Commission found adequate in New York and Texas. *See New York Order* ¶ 436 & n.1332; *Texas Order* ¶ 424 & n.1235. In Louisiana, the SEEM plan contains *no* limit on liability, although BellSouth is entitled to an expedited hearing prior to paying assessments beyond a "procedural" cap set at $59 million, or 20% of 1998 net revenues. *Varner La. Aff.* ¶ 351. These measures are thus more than 'sufficient to ensure compliance with the established performance standards,' *Second Louisiana Order* ¶ 364, and "to prevent backsliding" in the wake of section 271 relief, *Texas Order* ¶ 423."

Accordingly, while the trend is toward a much higher cap and/or procedural cap, Antonuk has, *sua sponte*, advocated for a lower cap. His ruling should not be allowed to stand. AT&T advocates a procedural cap as opposed to an absolute cap, or at least a raising of the cap to 44%, as approved by the various commissions discussed above.

B. COMPENSATION FOR CLEC DAMAGES

1. Relevance of compensation as a QPAP goal - Evidence of harm

Antonuk also makes the following statement without citation: "(t)he FCC does couch its test in terms of incentives, but an elementary legal principle in the field of

---

[26] *Id.* at p. 9.

remedies is the public interest in holding contract parties, tort feasors, and other culpable perpetrators of injury responsible for the damages they cause to induce them to behave in ways that will avoid such harm."[27] Although AT&T is not sure that the statement is rudimentary remedies principle, it does not dispute the fact that remedies should discourage a party from either breaching a contract or future tortuous actions.

However, Antonuk also indicates, again without citation, that "a central feature of this QPAP, like others before it is its ability to replace costly and protracted litigation and its uncertain results with a system that is more appropriate to creating and maintaining an efficient and balanced commercial relationship."[28] Accordingly, Antonuk equivocates the QPAP to a liquidated damage plan.

In order to determine the appropriateness of Antonuk's position, it is important to look at the state of the law on these issues.

Antonuk's premise that the QPAP **is** a liquidated damages contract as opposed to analogous[29] to a liquidated damages contract is wrong. Liquidated damages have been defined as "those damages which can reasonably be ascertainable at the time of breach, measurable by fixed or established external standard, or by standard apparent from documents upon which plaintiffs base their claim."[30]

AT&T could not say why this is the case better than the Colorado Public Utilities Commission in its CPAP report:

> (I)t is true that, in an ordinary commercial contract, parties would not have the ability to supplement liquidated damages. The SGAT, though, is not

[27] *See* Antonuk Report at p. 27.
[28] *Id.* at p.28.
[29] Analogous is defined in Webster's II New Riverside University Dictionary as "corresponding in some respects between otherwise dissimilar things."
[30] *Black's Law Dictionary* (6th Ed., 1990) citing *Ramada Development Co. v. U.S. Fidelity & Guarantee Co.,* 626 F.2d 517, 525 (C.A. Mich)

> an ordinary commercial contract. Rather it is a regulatory hybrid of a contract and a tool for furthering public policy. This Commission has the authority to ensure that Qwest's interconnection agreement with CLECs promote competition and adhere to the Act. This Commission also has the authority to levy fines on Qwest for providing poor retail and wholesale service. These principles, combined with the broad concern about post-271 backsliding, justify the risk that occasionally Qwest may overcompensate the CLECs for their damages, while preserving the right of the CLECs to sue when they are under compensated. The risk to Qwest is mitigated substantially by the probability that a court would not allow double recovery and would require an offset of any amount the CLEC received under the CPAP.[31]

There are other substantial differences, which AT&T brought into the record and Antonuk chose not even to address, between the QPAP and a typical bilateral contract. These differences include that the primary purpose of the QPAP is to assure that Qwest continues to meet its obligation under the Act; the exclusive reason it is being proffered by Qwest is to assure that Qwest continues to meet the public interest prong; there is substantial governmental intervention and control; parties are not on an even bargaining table; the QPAP is a section of the SGAT which is an offering mandated by the 1996 Telecommunications Act making it hardly a commercial contract; there is a statutory/non-contractual requirement that Qwest negotiate in good faith; and governmental entities are receiving payments under the QPAP without entering into any type of contractual relationship.[32]

Once Antonuk had considered the QPAP as a liquidated damages contract as opposed to the Colorado Public Utilities Commission interpretation of a performance assurance plan being analogous to a liquidated damage contract, Antonuk then severely criticized the CLECs for failing to establish what their damages were or would be.[33]

[31] *See* Exhibit B at p.65.
[32] *See* AT&T Reply Brief at p.8-9.
[33] *See* Antonuk Report at p. 28-30.

First AT&T was never notified that it carried the burden of prosecution in this proceeding. Even if had this burden, AT&T asserted it was impossible to quantify certain of its intangible losses.[34] For example, if Qwest misses a series of number ports to a condominium of 1,000 units, what is its loss to its goodwill? Is that loss to goodwill any different than if Qwest fails to port a number to the CEO or other decision maker of a Fortune Fifty Company with numerous business and governmental contacts? Were the CLECs supposed to collect affidavits or proffer witnesses to put a ballpark dollar figure on how much such Qwest conduct has harmed those CLECs? If so, such requirement is unprecedented and quite simply outrageous. Instead, the point that AT&T consistently made in the record is that the harm it suffers based on Qwest's discriminatory conduct is variable, possibly significant and extremely difficult to quantify on an aggregate basis. As discussed below, this is the reason that AT&T advocated the Colorado mandated means for alternative remedies after the CLEC meets a certain procedural threshold.

Furthermore, the record reveals that AT&T attempted to bring into the record various harm that it suffers when Qwest provides disparate services and was prohibited.[35] The evidence that AT&T was prohibited from bringing in included various broad areas of costs that CLECs could suffer when Qwest fails to perform. First, there would be the cost of unused AT&T personnel that would have performed the service. Then there is unused equipment cost. Furthermore, there are lost marketing costs for personnel and literature that AT&T could not utilize due to lack of ability to perform services. Then, if a customer is affected, there are goodwill issues including a cancellation of services. If the damage to AT&T is significant enough, AT&T could lose the customer for collateral

[34] *See* AT&T Initial Brief at p. 23.
[35] QPAP 8/29/01 Record at p. 50, l.9-51, l.12.

services including cable, wireless (under an affiliated company with AT&T's brand name), Inter/IntraLATA toll, and high-speed cable modem. AT&T cannot quantify this damage. It cannot know how long the customer would have kept the service, what other services were affected, what employees have been affected in the connections, if the employee could have found something else to do, if the equipment in question is otherwise being utilized, etc. This analysis is contained in AT&T's reply brief and was apparently ignored by Antonuk.[36]

As such, the record demonstrates that the CLECs did attempt to at least explore the types of damages that a CLEC could suffer. Summarizing Antonuk's position, the CLECs failed to provide evidence and "if judges and juries in the civil system were better at pondering the magnitude of the damages of this type, we would not need liquidated damages."[37] Thus, Antonuk apparently believes that the liquidated damage concept is better than the Article III of the United States Constitution concept of an independent judiciary. AT&T's position is that it cannot predict the exact cost of certain damages until they occur. However, in many circumstances, the QPAP will remedy such harm. However, for substantial harm not contemplated by the QPAP, AT&T has much more faith in the judicial system than Antonuk and believes as discussed in greater detail below, as mandated by the Colorado Public Utilities Commission, that it should be allowed to seek additional remedies if it meets strict procedural threshold.

---

[36] *See* AT&T QPAP Reply Brief at p. 6-7.

[37] *See* Antonuk Report at p. 31. AT&T has reviewed noted remedies hornbooks and has found no correlation between lack of faith in the judicial system and liquidated damages. Furthermore, under Antonuk's premise, it is difficult to ascertain why Antonuk, a consultant, would be any better than a judge or jury in determining the appropriateness of certain remedies, especially in light of the fact that the damage had not yet occurred during the Antonuk review.

Keeping in mind the AT&T exceptions to Antonuk's Relevance of Compensation as a QPAP Goal/Evidence of Harm to CLECs/Preclusion of Other CLEC Remedies sections above, it is important to view both AT&T and Qwest's solution to preclusion of other remedies before addressing Antonuk's ruling on Preclusion of Other CLEC Remedies and Offset.

As explained in the Antonuk report, AT&T's proposal is the same as the Colorado Public Utilities Commission's mandated CPAP Sec. 16.6. Under that provision, before "CLECs shall be able to file an action seeking contract damages that flow from the alleged failure to perform in an area specifically measured and regulated by the CPAP, CLEC must first seek permission through the Dispute Resolution Process…to proceed with the action. The permission shall be granted only if a CLEC can present a reasonable theory of damages for the non-conforming performance at issue and evidence of real world economic harm that, as applied over the preceding six months, establishes that the actual payments collected for non-conforming performance in the relevant area do not redress the extent of the competitive harm."[38]

As to offset, AT&T recommended the same language found in FCC approved QPAPs as well as recommended by the Colorado Public Utilities Commission. That language is as follows: "(i)f for any reason CLEC agreeing to the QPAP is awarded compensation for the same or analogous wholesale performance covered by the QPAP, Qwest shall not be foreclosed from arguing that such award should be offset with amounts paid under the QPAP."[39]

---

[38] *See* Exhibit B (CPAP) at p. 15.
[39] *See* S9-ATT-JFF-7 at sec. 6.2 (the Texas PAP); Exhibit B at sec. 16.6.

Even Qwest inserted in its QPAP and briefs that the QPAP would not preclude CLECs claims based on non-contractual and statutory causes of action.[40] The Qwest language is as follows:

> *QPAP. Sec.* 13.5. *By incorporating these liquidated damages terms into the PAP, Qwest and CLEC accepting this PAP agree that proof of damages from any non-conforming performance measurement would be difficult to ascertain and, therefore, liquidated damages are a reasonable approximation of any contractual damages that may result from a non-conforming performance measurement. Qwest and CLEC further agree that Tier 1 payments made pursuant to this PAP are not intended to be a penalty. The application of the assessments and damages provided for herein is not intended to foreclose other noncontractual legal and non-contractual regulatory claims and remedies that may be available to a CLEC.*
>
> QPAP Sec. 13.6 *To elect the PAP, CLEC must adopt the PAP in its entirety, in its interconnection agreement with Qwest in lieu of other alternative standards or relief. In no event is CLEC entitled to remedies under both the PAP and under rules, orders, or other contracts, including interconnection agreements, arising from the same or analogous wholesale performance. Where alternative remedies for Qwest's wholesale performance are available under rules, orders, or other contracts, including interconnection agreements, CLEC will be limited to either the PAP remedies or the remedies available under rules, orders, or other contracts and CLEC's choice of remedies shall be specified in its interconnection agreement.*

However, Qwest indicated that QPAP 13.5 and 13.6 should be read contemporaneously with a Qwest drafted, unprecedented and in AT&T's view contrary to established legal precedent Qwest offset section related to this provision.[41]

That Qwest provision reads as follows:

> *13.7 If for any reason Qwest is obligated by any court or regulatory authority of competent jurisdiction to pay to any CLEC that agrees to this QPAP compensatory damages based on the same or analogous wholesale*

[40] *See* Antonuk Report at p. 30 citing Qwest Initial PAP Brief at p. 68.
[41] *Id.* citing QPAP Section 13.7.

performance covered by this PAP, Qwest may reduce such award by the amount of any payments made or due to such CLEC under this PAP, or may reduce the amount of any payments made or due to such CLEC under this PAP by the amount of any such award, such that Qwest's total liability shall be limited to the greater of the amount of such award or the amount of any payments made or due to such CLEC under this QPAP. By adopting this QPAP, CLEC consents to such offset.

Antonuk addressed the issues as follows: He kept the language in 13.5.[42] As to 13.6, he indicated that it should be edited to simply read "To elect the PAP, CLECs must adopt the PAP in its entirety in its interconnection agreement with Qwest."[43] As to the offset provision, Antonuk asked Qwest to change "same or analogous wholesale performance to "same underlying activity or omission for which Tier I assessments are made under the QPAP."[44] He further indicated that a sentence should be added to indicate "(n)othing in this QPAP shall be read as permitting an offset related to Qwest payments related to CLEC or third-party physical damage to property or physical injury."[45]

The ramifications of Antonuk's changes in the aggregate are tremendous, essentially allowing Qwest *carte blanche* to re-monopolize local telecommunications without any ramification except QPAP payments which Qwest will easily be able to calculate. First, as Antonuk explains, based on his language changes, a CLEC will have no ability to seek any remedy for even exceptional contractual remedies. For example, if Qwest decided to not fulfill any orders for TI lines (each representing a possible loss of approximately one hundred customers), knowing that it could put all CLECs utilizing that

[42] *Id.* at p.32.
[43] *Id*.
[44] *Id*.
[45] *Id*.

technology out of business, under the Antonuk language, a CLEC would be precluded from bringing a contractual cause of action.[46]

As discussed above, this approach is inconsistent with the findings of the Colorado Public Utilities Commission who found "CLEC's ability to sue for additional contract damages is a safeguard against extraordinary losses that CLECs might suffer as a result of Qwest's poor performance. While the CPAP payment structure will be periodically evaluated as adjusted to reflect fair compensation and average losses incurred by CLECs, there may still be occasions in which poor performance results in unusually high CLEC loss. The SGAT language should allow for the CLECs to recover these losses via court action if there is a valid cause of action."[47] However, Antonuk is correct that the Texas Public Utilities Commission did not allow the recovery of contractual type remedies. Instead, both Texas and even Qwest advocated for the recovery of non-contractual remedies including statutory remedies, such as anti-trust, and tortuous remedies, such as intentional interference with contract.

Antonuk however, takes an additional step, without legal citation and contrary to relevant legal principle, indicating if the CLECs sued and received any other type of remedy, such as an anti-trust remedy, a CLEC should be precluded from receiving anything but the "adder."[48] For example, because anti-trust allows for treble damages, a CLEC's base damages would be precluded because it is "direct harm for a contract breach." (this incorrect proclamation is addressed below).[49] A CLEC would then only be allowed to receive two thirds of the damages awarded by a court of law for those

[46] Antonuk Report at p. 32.
[47] *See* Exhibit B at p.64.
[48] *See* Antonuk Report at p. 32.
[49] *Id.*

damages (assuming the court of law would even treble the damages, as the jury brings the verdict for actual damages and the verdict is trebled by the judge.)[50]

The problem with Antonuk's analysis is that if he had done the necessary legal research, he would have found that the causes of action, breach of contract vs. antitrust are completely distinguishable. In an antitrust case, a statutory case, the damage that a CLEC suffers is related to conduct of the defendant excluding the plaintiff(s) from the relevant market.[51] As such the damages are measured by the profits the plaintiff would have made had the defendant not excluded the plaintiff from the market, not what the contract was between the parties.[52] To ignore the distinguishing characteristics of the two causes of action is both prejudicial to the CLECs and just plain sloppy legal analysis.

An even better illustration of the inappropriateness of Antonuk's position is related to the tort theory, intentional interference with contract. That tort requires the plaintiff to establish by a preponderance of the evidence that 1) he had a contract with a third party, 2) the defendant knew of the contract, 3) the defendant intentionally interfered with the performance of the contract, 4) the defendant's interference with the contract was improper, and 5) the defendant's interference with the contract caused plaintiff damages.[53] If a CLEC sued Qwest under this cause of action, the damages are caused not by what the contract is between Qwest and the CLEC, but Qwest's interference with the contract between the CLEC and a third party. Just because a CLEC participates in a plan intended to prevent Qwest from backsliding off its 251 obligations, a CLEC should not legally be barred from collecting damages for such remedies.

---

[50] 15 U.S.C.A. Sec. 15(a).
[51] *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125, rehearing denied, 401 U.S. 1015 (1971).
[52] *Id.*
[53] CJI 4th 24:1 (August 1, 2000).

Besides the overt legal inappropriateness of Antonuk's position, there are also public policy concerns. If the Antonuk approach stands, a CLEC would be hard pressed to sue Qwest realizing that it would be literally robbed of damages if it prevailed just because a CLEC was receiving "liquidated damages" from a performance assurance plan. Accordingly, this Commission would be giving Qwest *carte blanche* to rid itself of competition by offering a performance assurance plan in which the penalties are predetermined, and essentially eviscerates any type of alternative CLEC remedy. As the FCC has never allowed 271 relief when a plan has such harsh policy ramifications, this Commission should look extremely carefully at this lowering the bar to heights never contemplated by the FCC or any other state commission.

To add insult and more injury to the injury that Antonuk had already caused, Antonuk blessed Qwest's offset language found in QPAP Sec. 13.7, language again never contemplated by the FCC. This language was immediately stricken by the Utah Division of Public Utilities Staff.[54] AT&T advocates that the relevant commission do the same. As discussed above, QPAP Sec. 13.7 allows Qwest to unilaterally offset amounts paid under the QPAP. For example, if the CLECs were able to obtain a judgment in a court of law, Qwest would be able to withhold that payment claiming that it was already paid under the QPAP. Accordingly, a CLEC is required to forego the right to collect a judgment it received in a court of law if it wishes to participate in the QPAP.

AT&T agrees that double recovery for the same damages is legally barred.[55] However, offset is a judicial concept for **the finder of fact** to consider to assure that an

[54] *See* Exhibit A at p. 37-39.
[55] *See* e.g. CJI 4th 6:14 (1988).

aggrieved party does not receive double recovery.[56] That is why the Texas PAP and Colorado CPAP do not preclude Qwest from arguing for offset in the relevant court of law. However, they do not allow Qwest to unilaterally offset payments.

Antonuk indicates that Qwest is not really allowed to unilaterally offset payments because the opposing party can always utilize dispute resolution provision involving petitioning to the relevant commission.[57] As such he believes that offset is really an issue of allowing Qwest to hold onto its money while, you, the relevant commission sort out whether the offset, i.e. Qwest refusing to pay a **legal judgment** was appropriate.[58] A review of the QPAP Section 13.7 language speaks for itself in indicating that this is hardly the issue. More importantly, it is not what the FCC contemplated and will certainly "leave the door open unreasonably to litigation and appeal," precisely what the FCC has prohibited in a performance assurance plan.[59]

Respectfully, as under the Texas and Colorado language, Qwest will have every opportunity to explain why offset is or is not appropriate to a judge and/or jury and that judge and/or jury will have a far better understanding of the cause of action at issue (e.g. antitrust, tort), that finder of fact should be the entity to determine offset, not Qwest.

In summary, AT&T feels that Antonuk has significantly misinterpreted these issues potentially sacrificing the integrity of the plan. Accordingly, it requests that the relevant Commission adopt the language of the Colorado Public Utilities Commission related to preclusion of CLEC remedies (CPAP 16.6), and the Texas Public Utilities

[56] *Id*.
[57] Antonuk Report at p. 35-36.
[58] *Id*.
[59] *See* FCC New York Order at para. 433.

Commission (as approved by the FCC)[60], the Utah Division of Public Utilities,[61] and/or the Colorado Public Utilities Commission's [62] language related to offset.

C. INCENTIVE TO PERFORM

1. Tier 2 Payment Use (sic)

AT&T (and apparently Utah Division of Public Utilities Staff) take substantial issue to Antonuk's *sua sponte* action of creating a funding mechanism utilizing **Tier 1** payments to the CLECs to create a "special fund" that would be available for "states participating in a common administration effort to use for: (a) administrative activities, (b) dispute resolution, and (c) other wholesale telecommunication service activities determined by the participating commissions to be best carried out on a common basis."[63]

If this had even been in the realm of what exists in the record in this proceeding (the fact that it is not should disqualify the proposal), AT&T would have argued that Antonuk's proposal to skim off one-fifth of certain escalation remedies that the CLEC is entitled to is simply inappropriate. CLECs already pay state taxes, certification fees, and/or regulatory fees to support the activities of the relevant commissions. Requiring CLECs (as opposed to Qwest) to pay, under Antonuk's proposal, part of its exclusive "remedies" to support a vaguely articulated "common administration effort" reeks of inequity.

As the record demonstrates, various CLECs already take issue with the amount of penalties for certain measures. Antonuk did not provide CLEC relief on those issues. Next, Antonuk limited the CLEC's ability to seek alternative remedies and gave Qwest

[60] S9-ATT-JFF-7 at sec. 6.2 (the Texas PAP).
[61] Exhibit A at p. 37.
[62] Exhibit B (CPAP) at sec. 16.1. p. 14.
[63] Antonuk Report at p. 44-45.

"the key to the kingdom" to withhold any other remedies that the CLECs did get. As the final lynchpin, Antonuk wants the CLECs to pay one fifth of the escalating remedies that the CLECs do receive under the QPAP for a "common administrative effort."

As does the Utah Division of Public Utilities Staff,[64] AT&T takes no issue to Tier 2 penalties being used, for such a purpose, as they are purely incentive payments payable to the states. However, AT&T takes substantial issue with Tier 1 payments being utilized. Accordingly, AT&T requests that the utilization of Tier 1 payments be stricken from this provision utilizing the approach of the Utah Division of Public Utilities Staff.

2. Three Month Trigger of Tier 2 Payments

AT&T requests clarification of a statement in the Final QPAP Report which reads, "[e]scalation should then take place as provided in the QPAP."[65] The reference to escalation appears to be related to Tier 2 payments. Unlike for Tier 1 payments[66] the latest QPAP does not have any provisions for escalation of Tier 2 payments.[67] AT&T requests clarification of how Antonuk intended to provide for escalation of Tier 2 payments.

3. Limiting the Escalation to Six Months

Antonuk appears to be the only adjudicator in the Qwest region to agree with Qwest that limitation of escalation after six months is an economically sound concept. Both the Colorado Public Utilities Commission and the Utah Division of Public Utilities Staff have summarily dismissed such a concept.[68] In fact, the Colorado Public Utilities

---

[64] *See* Exhibit A at p. 44-45.
[65] Final QPAP Report, p. 43.
[66] S9-QWE-CTI-1, Section 6.2.2, Table 2.
[67] S9-QWE-CTI-1, Section 7.3.1, Table 3.
[68] Exhibit A at p. 46-48; Exhibit B at p. 59-60.

Commission indicated that "Qwest's argument to freeze escalated penalties makes no logical sense."[69]

The Utah Division of Public Utilities Staff summarily rejected Antonuk's argument indicating that in order to obtain 271 relief in the first place, Qwest will have to establish that it is able to meet the measures.[70] Furthermore, as AT&T had argued in the QPAP proceedings, the Utah Division of Public Utilities Staff indicated "there is certainly a common belief and expectation that Qwest can meet all of these measures; otherwise, it is difficult to see why Qwest would have agreed to them."[71]

A review of the record would demonstrate that Qwest instead argued that the escalated payment may "dwarf" the cost of service in question as well as the fact that the payments are high enough to motivate Qwest to perform. The Colorado Public Utilities Commission shot down that argument indicating that it missed the point because "payment escalations are meant to be a balance between compensating the CLECs for their losses and ensuring that the penalty is higher than the amount that Qwest is willing to absorb as a cost of doing business."[72] That commission continues "(s)ince the value to Qwest of suppressing competition in a particular market may dwarf the cost of the relevant services that Qwest should be selling, sometimes the escalation may have to be significant to motivate Qwest to perform. Although the idea that Qwest would rationally evaluate whether it is more valuable to absorb penalties and retard competition or to adhere to the law and avoid penalties is still purely speculative, one of the underpinnings of this performance plan is to ensure this type of strategic action is deterred. Continuous

---

[69] *Id*.
[70] Exhibit A at p. 47-48.
[71] *Id*.
[72] Exhibit B at p. 59.

escalation of payments for continuous poor performance should help prevent this strategic activity."[73]

In speculating as to what might be the cause of Qwest performance failing to meet the designated performance standards more than six months in a row, Antonuk apparently rejects the notion that it could be as simple an answer as Qwest providing lousy service. Instead, Antonuk, without any evidence to support the speculation, suggests that maybe the problem is really with the standards and not Qwest's performance. The Final QPAP Report states, "If non-compliance continues for half a year in the face of stiff financial consequences, one of the issues that would bear consideration is the achievability of the established benchmark itself."[74] For parity standards Antonuk attempts to explain away poor Qwest performance with the statement that, "[m]oreover, even the parity measures, while based on a substantiated and common belief that there are no material differences between serving retail and wholesale customers, cannot be said to rest upon an absolute certainty that growing experience with the CLEC community will not show otherwise."[75] It appears that with respect to Antonuk's parity standards argument, that "absolute certainty" was the evidentiary standard that the CLECs should have applied -- if anyone had actually made the argument that the parity standard was not achievable. Notwithstanding the fact that no party argued that the parity standards were unachievable, is it is not proper to adopt the extremely high evidentiary standard of "absolute certainty." About the only thing for which we can be absolutely certain is that we are all going to pay taxes and die. It also appears, in the mind of Antonuk, that for chronic and continually poor Qwest performance the likely culprits are bad benchmarks and bad

---

[73] *Id.* at p. 59-60.
[74] Final QPAP Report, p. 44.
[75] Final QPAP Report, p. 44.

parity standards. This conclusion is unsupported by any evidence in the record and flies in the face of conclusions that Antonuk reached in other portions of the Final QPAP Report.

As an initial matter, to AT&T's knowledge, Qwest has never argued in this or any other proceeding that the benchmarks for ROC PIDs are "unachievable" or that parity as a standard for other ROC PIDs is unfair or inappropriate. Even Qwest was not so brazen to argue that escalation should cease at six months because it may turn out that the benchmarks are "unachievable" or that parity is too tough a standard to meet. Qwest has made no proposal in this proceeding to change any of the potentially "unachievable" ROC PID benchmarks or to water down any of those legal, yet somehow inappropriate, parity standards. Qwest's argument against unlimited escalation was basically that it would overcompensate CLECs and that there is no evidence to indicate that the payment amounts do not provide significant incentive to comply with the designated performance standards.[76] Qwest never argued that the unlimited escalation proposal should be rejected because it could be an indication of inappropriate benchmark and parity standards. In addition, the Final QPAP Report itself finds:

> No participant disputed that the PEPP collaborative sought to achieve a broad set of measures to include in the QPAP's payment structure. There was also not, per se, any challenge to the breadth or comprehensiveness of the measures that were agreed to during that collaborative. The issue in dispute essentially was about whether substantial grounds existed for including additional measures.[77]

While it now appears that Antonuk was the only participant in this proceeding who supported the theory that the benchmark and parity standards may be defective, there

[76] Final QPAP Report, p. 44.
[77] Final QPAP Report, p. 46.

is no evidence of any questioning of any witness at any time by Antonuk in an attempt to obtain evidence to support the "bad standards" theory. What makes the "bad standards" theory even more puzzling is a statement by Antonuk that, "[t]he next sections of this report discuss the merits of adding to what we conclude is generally a well articulated set of pre-determined measures and standards that span the range of carrier-to-carrier performance."[78] (emphasis added)

Antonuk also concluded that, "[t]here is no evidence in this record that would demonstrate with certainty that those [benchmark] levels of performance can be met and sustained at any cost that is within the realm of economic reason."[79] As an initial matter, AT&T suggests that it is not proper to adopt the extremely high standard of demonstrating "with certainty" that the levels of performance can be met. Again, about the only thing that is known with certainty is that we are all going to pay taxes and die. If "demonstration with certainty" is the evidentiary standard in this proceeding, there is little that anyone would be able to prove. Given that no party in this proceeding advanced the theory that the benchmark levels of performance cannot be met or sustained, it is not surprising that the record would not contain any evidence that the benchmark levels of performance can be met and sustained at any cost. Antonuk is apparently suggesting that the CLECs failed to provide evidence to rebut an argument that no party ever made. A cursory review of Qwest's monthly performance results shows that Qwest routinely achieves most of the performance measurements with benchmarks as standards.[80] AT&T assumes that since Antonuk only made this "unachievable benchmark" argument in the Final QPAP Report, there will be no

[78] Final QPAP Report, p. 46.
[79] Final QPAP Report, p. 44,
[80] Qwest Regional Performance Results, October 25, 2001.

objection to rebutting this argument with evidence after the record has been closed. Given that Qwest is today easily meeting nearly all of the performance measurements with benchmarks, it is antithetical to the notion of a backsliding plan to suggest, as Antonuk does, that benchmarks that Qwest is meeting today would not have to be met tomorrow.

Antonuk also advances the "bad standards" theory with the statement that the benchmark standards, "generally relate to the provision of services about which there was relatively little experience when the measures were adopted."[81] Since the adoption of the standards, Qwest has had much experience with the services in question. If Qwest's experience has shown that the benchmarks are "unachievable," Qwest has had ample opportunity in numerous forums to have those benchmarks adjusted. The "new standards" corollary to the "bad standards" theory does not comport with Qwest's performance results or any arguments that Qwest has made. Even if it turns out in the future that the benchmarks are "unachievable" or parity is an unfair standard, Qwest will have the opportunity during the six-month review to have the benchmarks or parity standards changed.

The CLECs and the New Mexico Advocacy Staff have made an argument that if Qwest's performance for a performance measurement remains non-compliant for over six consecutive months, then evidence exists that the payment levels have not escalated to the point that would induce Qwest to come into compliance with those performance measurements. Consequently, the CLECs and the New Mexico Advocacy Staff advocate that the payment levels should escalate continuously until compliance with the designated performance standards are finally met. Antonuk abruptly dismisses this argument as

[81] Final QPAP Report, p. 44.

"speculative" and rebuts that argument with Antonuk's own speculation disguised as "other factors."[82]

In Antonuks's zeal to rule out plain, old, poor performance on the part of Qwest as the source of six plus months of inadequate Qwest performance to CLECs, Antonuk offered up the following speculative excuses:

(a) a less than optimally crafted standard,
(b) a series of extenuating external circumstances,
(c) buyer efforts to induce failure,
(d) management's performance decisions and actions (that may have been soundly believed sufficient to improve performance, but proven inadequate only as time passed),
(e) or even other reasons, caused or contributed to a failure to provide compliant performance.[83]

AT&T has already addressed in its comments above the "bad standards" theory that is offered as excuse (a) above. Excuse (b) could also be described as a "force majeure event." The force majeure provision has already been addressed in the Final QPAP Report.[84] If Qwest believed its performance was affected by a series of extenuating external circumstances for more than six months in a row, it could exercise the force majeure provisions of section 5.7 of the SGAT and presumably have the affected performance excluded from the performance measurements. Since Qwest is already protected against force majeure events, it is unclear why Antonuk treats "a series of extenuating external circumstances" as if Qwest does not already have that protection. Excuse (c) could also be described as CLEC bad faith. Like with force majeure events, Qwest is already protected against "buyer efforts to induce failure."[85] Qwest has the ability to make a CLEC bad faith claim and have the performance results adjusted

[82] Final QPAP Report, p. 45.
[83] Final QPAP Report, p. 45
[84] Final QPAP Report, pp. 39 – 40.
[85] Final QPAP Report, pp. 38 – 39.

accordingly. Excuse (d) comes the closest to recognizing that maybe Qwest has some culpability in why its performance to CLECs has been inadequate for more than six consecutive months. Unfortunately, with excuse (d) Antonuk has apparently created a companion exclusion to force majeure events and CLEC bad faith. That new exclusion is the "our performance is still chronically bad, we had a sound belief that we had the right solution but we were wrong" exclusion. Finally, in excuse (e) there is the epitome of speculation, "other reasons, caused or contributed to a failure to provide compliant performance." In sum, the "it's not Qwest's fault" theory that underlies Antonuk's decision to discontinue payment escalation at six months is not sufficiently reliable to reject continuous payment escalation.

Antonuk also argued one other factor that makes the freezing of escalation at six months appropriate is that, "[t]here are provisions for root cause analyses of continuing, substantial problems."[86] Antonuk has placed far too much confidence in Qwest's proposed root cause analysis provision. What Qwest and Antonuk characterize as a root cause analysis provision reads more like a mechanism designed by Qwest to get out from under Tier 2 payments. The language closest to a root cause analysis provision is, "Qwest will investigate any second consecutive Tier 2 miss to determine the cause of the miss and to identify the action needed in order to meet the standard set forth in the performance measurements."[87] Qwest will not perform any root cause analysis on any Tier 1 failures, Qwest will not conduct any CLEC specific root cause analysis of failures, there is no obligation for Qwest to do anything once it has completed the root cause

[86] Final QPAP Report, p. 45.
[87] Qwest QPAP, Section 15.5.

analysis and Qwest will only conduct root cause analysis of Tier 2 failures once there has been six consecutive months of Tier 2 failures.

The bulk of Qwest's alleged root cause analysis provision focuses on how Qwest would get credits against future Tier 2 payments if the Qwest controlled and Qwest performed root cause analysis determines that CLECs were even partly to blame for Qwest's aggregate performance to CLECs becoming non-compliant for six consecutive months. The exact language proposed by Qwest is as follows:

> To the extent an investigation determines that a CLEC was responsible in whole or in part for the Tier 2 misses, Qwest shall receive credit against future Tier 2 payments in an amount equal to the Tier 2 payments that should not have been made. The relevant portion of subsequent Tier 2 payments will not be owed until any responsible CLEC problems are corrected.[88]

Rather than characterizing section 15.5 of Qwest's proposed QPAP as a "root cause analysis" provision, AT&T believes it should more aptly be characterized as the "fox guarding the hen house" provision.

The Order in Colorado and a decision by one of the states that is a party to this proceeding to include continuous escalation is all the more appropriate in light of three other factors:

- If Qwest believes the ROC benchmarks or ROC parity standards are unachievable, it can seek to have them changed during the six month review period,
- If Qwest believes there is a series of extenuating circumstances that prevent its compliance with the designated performance standards it can seek an exclusion pursuant to the SGAT force majeure provisions, and
- If Qwest believes that a CLEC is attempting to induce Qwest failure it can seek an exclusion pursuant to the CLEC bad faith section of the QPAP.

[88] Qwest QPAP, Section 15.5.

In summary, both the Utah Department of Public Utilities Staff, a Ph.D. in Economics from the New Mexico Staff and the Colorado Public Utilities Commission have made excellent arguments on why escalation should continue until Qwest provides adequate performance. The Antonuk analysis was unsolicited, not supported by the record, and misses the mark. Accordingly, it should be rejected.

IV. STRUCTURE TO DETECT AND SANCTION POOR PERFORMANCE AS IT OCCURS

A. 6-MONTH PLAN REVIEW LIMITATIONS

Antonuk acknowledges AT&T's issues with the six-month review process but does not address those issues, instead of focusing his attention exclusively on Qwest's issues such as Qwest control and Qwest expense of the six-month review.[89]

AT&T's most fundamental issue with the six-month review process is that Qwest would control if any changes that would be made, or even addressed in the six month review.

Antonuk indicated that the CPAP provided appropriate guidance on how to handle this issue.[90] According to Antonuk, the CPAP (as articulated in the Colorado Special Master's Report) "would grant state public service commissions authority to decide on the propriety of any identified changes, which the commissions would then **ask** Qwest to include in an amended SGAT filing."[91] Antonuk also noted that the CPAP limited the six-month review by prohibiting revisiting statistical methods applicable to parity determinations, prohibit revisiting the payment structure and the categorization of payments by tiers, and prohibit revisiting the methods for capping payments.

[89] Antonuk Report at p.60-61.
[90] *Id.*
[91] *Id*. at p.60.

Antonuk is wrong in his characterization of the CPAP. Pursuant to CPAP §18.5, the six-month CPAP review process shall focus on refining, shifting the relative weighting of, deleting, and adding new PIDs. After the **Commission** considers such changes through the six-month process, it shall determine what set of changes should be embodied in an amended SGAT that Qwest **will file** in order to effectuate these changes."[92] (emphasis added). CPAP Sec. 18.6 allows parties to "suggest more fundamental changes to the plan; but unless the suggestion is highly exigent, the suggestion shall either be declined or deferred until the three-year review."[93]

This is precisely the equitable solution that AT&T seeks because it shifts the control of what can be changed away from Qwest and allows for reviews of additional aspects of the plan if there are exigent circumstances.

The Utah Division of Public Utilities Commission hints at this approach by indicating "in all events, the Utah Public Service Commission will be the ultimate decision maker in the decision making process to proposed QPAP changes.[94]

Antonuk does not propose any type of concrete solution to this issue. There should be a definitive solution to the issue consistent with the CPAP that Antonuk endorses and the Utah Public Service Commission's Report, allowing for review of all aspects of the QPAP if a party can demonstrate exigent circumstances, and shifting ultimate change control to the relevant commission.

The Final QPAP Report also contains several misleading statements with regard to how the Texas PAP compares to the proposed QPAP. The first misleading statement is in regards to approval of changes to existing performance measurements. With respect

---

[92] Exhibit B (CPAP) at p.19.
[93] *Id*.
[94] Exhibit A at p. 65.

to approval of changes to performance measurements and how the proposed QPAP compares to the Texas PAP, the Final QPAP Report states, "[t]he requirement that the BOC agree to changes in existing performance measures is also the same."[95] It should be noted that the Final QPAP Report identifies what are purportedly four types of changes contained in both the Texas QPAP and the proposed QPAP.[96] The second bulleted change type is, "[c]hange of benchmark standards to parity standards (based on whether there was an omission or failure to capture intended performance." The change type as identified in the Final QPAP Report leaves out one important element. Both the Texas PAP and the proposed QPAP include the change, "whether the applicable benchmark standards should be modified or replaced by parity standards."[97] (emphasis added) Both the Texas PAP and proposed QPAP recognize that benchmark standards can be changed or changed to parity standards. Notwithstanding what AT&T believes to be an inadvertent oversight in the QPAP Final Report, the provisions for approval of changes in the Texas PAP and the proposed QPAP are quite different. The Texas PAP includes the provision, "[a]ny changes to existing performance measures and this remedy plan shall be by mutual agreement of the parties and, if necessary, with respect to new measures and their appropriate classification, by arbitration."[98] (emphasis added) The proposed QPAP includes the statement, "[c]hanges shall not be made without Qwest's agreement."[99] There is a significant difference between changes by "mutual agreement of the parties" with Qwest as one of the parties as is found in the Texas PAP and the unilateral Qwest approval of changes that Qwest proposes.

---

[95] Final QPAP Report, p. 60.
[96] Final QPAP Report, p. 59
[97] S9-ATT-JFF-9, p. 6 and S9-QWE-CTI-1, p. 16.
[98] S9-ATT-JFF-9, p. 6.
[99] S9-QWE-CTI-1, p. 16.

The Final QPAP Report also contains a misleading statement with respect to the types of permitted changes in the Texas PAP and the proposed QPAP. The Final QPAP Report claim that, "[t]he four types of permissible changes are all the same."[100] The Final QPAP Report also claims that the "[o]ne material difference [between the Texas PAP and the QPAP] is that questions related to the addition of new measures may be resolved by arbitration."[101] These two claims are misleading. It is true that there are four types of changes that the Texas PAP and the proposed QPAP have in common. However, it is also true that the Texas PAP permits changes to the "remedy plan" while the proposed QPAP only permits changes of the type identified on page 59 of the Final QPAP report. AT&T considers the fact that pursuant to the Texas PAP any element of the remedy plan can be changed while the changes in Qwest's proposed QPAP are limited to changes involving performance measurements as a second "material difference." In addition to questions related to the addition of new measures, the Texas PAP also allows questions of changes to the remedy plan to be resolved by arbitration. The Final QPAP Report failed to highlight this other material difference.

B. 100% CAPS FOR INTERVAL MEASUREMENTS

Antonuk misunderstood the CLECs' arguments with respect to the application of a per-occurrence measurement scheme for interval measurements and then criticized the CLECs for not providing evidence to support an argument they never made. Antonuk believed that the CLECs were arguing that the per-occurrence scheme should only measure the severity of the deviation from the standard and should not consider the

[100] Final QPAP Report, p. 60.
[101] Final QPAP Report, p. 60.

volume of CLEC orders.[102] The Final QPAP Report provides an illustrative example of the impact of making a per-occurrence scheme for interval measurements purely sensitive to the severity of the deviation of Qwest's performance to CLECs from Qwest's performance to itself. [103] Antonuk's purpose in including this example in the QPAP Final Report appears to be to illustrate what he erroneously believed to be the impact of the CLEC position. Antonuk then went on to suggest that the "better argument" the CLECs should have made is that the per-occurrence approach should "measure both the number of individual misses and then to assign a severity level to each of those individual misses."[104] Antonuk was wrong in both his understanding of the CLEC arguments and his suggestion as to what the better CLEC argument should have been.

AT&T always understood that the per-occurrence scheme for interval measurements was sensitive to both the volume of CLEC orders[105] and the severity of the deviation of Qwest's average monthly performance to CLECs from Qwest's average monthly performance to itself. AT&T objected to Qwest's proposal to, for payment purposes, cap at 100% the severity of the deviation of Qwest's performance to CLECs from Qwest's performance to itself.[106] AT&T argued that through the use of the 100% cap Qwest was protecting itself against its own poor performance to CLECs.[107]

With respect to the issue of a 100% cap on interval measurements, the CLECs never argued that the per-occurrence scheme should be a per missed order scheme. The Final QPAP Report recognizes Z-Tel's argument that it is "improper[] [to] seek[] to

[102] Final QPAP Report, p. 69.
[103] Final QPAP Report, p. 69.
[104] Final QPAP Report, p. 69.
[105] In this section AT&T's use of the word "order" should also be understood to include trouble reports.
[106] AT&T Brief, p. 26 and AT&T Reply Brief, p. 13.
[107] AT&T Brief, p. 26 and AT&T Reply Brief, p. 13.

introduce the number of misses into a measure that does not and cannot use the number of misses to measure performance."[108] AT&T argued that payment occurrences "are not intended to reflect poor performance on an order-by-order basis."[109] It should be noted that even Qwest recognized that "interval measurements do not directly measure the number of orders that missed the interval standard."[110]

The fact that both Z-Tel and AT&T argued against Qwest's apparent equating of the per-occurrence scheme as a per-miss scheme with its "phantom order" approach did not mean that Z-Tel and AT&T did not recognize that the per-occurrence scheme should also be sensitive to CLEC volumes. AT&T agrees with the Final QPAP Report's conclusion that the "QPAP must make the payment somehow volume sensitive."[111] Antonuk seemed to recognize that CLECs who opposed the QPAP's truncation implicitly accepted the need for a per-occurrence scheme that is volume sensitive.[112] However, Antonuk also appeared to criticize the CLECs for not explicitly acknowledging what AT&T believed to be obvious; that the per-occurrence scheme should be volume sensitive.

Both Z-Tel and AT&T argued that, for interval measurements, the per-occurrence scheme is also sensitive to the deviation of Qwest's performance to CLECs from Qwest's performance to itself. The Final QPAP Report recognized Z-Tel's advocacy of the "sound principle that what Qwest pays should increase as the divergence between its performance for itself and its performance for CLECs increases."[113] AT&T argued that

[108] Final QPAP Report, p. 68.
[109] AT&T QPAP Reply Brief, p. 13.
[110] Qwest Multistate Reply Brief, p. 18.
[111] Final QPAP Report, p. 69.
[112] Final QPAP Report, p. 69.
[113] Final QPAP Report, p. 68.

"[t]he farther that Qwest's performance deviates from the standard, the more severe the payment."[114]

To be precise, the CLECs' argument is that the per-occurrence scheme for interval measurements should be sensitive to both the monthly volume of the CLEC orders and the deviation of Qwest's average monthly performance to a CLEC from the Qwest average monthly performance to itself. Contrary to Antonuk's understanding, the CLEC argument was not that the per-occurrence scheme should measure the number of individual misses and then to assign a severity level to each miss. Based upon Antonuk's misunderstanding,[115] Antonuk concludes that the CLECs are arguing for a "different sort of impurity" and criticizes the CLECs for failing to provide "the actual distribution of numbers of misses and their extent."[116]

Notwithstanding Antonuk's misunderstanding of the arguments and the unnecessary complexity in the QPAP Final Report that resulted from that misunderstanding, this really is a very simple issue. For interval measurements, the CLECs and AT&T would venture to guess Qwest as well, would agree that the per-occurrence scheme is sensitive to the volume of CLEC orders and the severity of the deviation of Qwest's average monthly performance to CLECs from Qwest's average monthly performance to itself. The issue at hand is with respect to the severity of Qwest's deviation of its average monthly performance to CLECs from its average

---

[114] AT&T Reply Brief, p. 13.

[115] It should also be mentioned that Antonuk misunderstood the mechanics of the per occurrence calculation for interval measurements. Antonuk provided an example on page 68 of the Final QPAP Report that "a 3-day actual average interval for 100 events that are subject to a 2-day interval would produce a miss of 150 percent." Antonuk then described the calculation used to reach the 150 percent miss as "[t]he formula looks like this: 100 events times 3/2 = 1.5 or 150 percent." In fact, the formula that Qwest proposed in Section 8.2.1.2 Step 2 of the QPAP is, "[t]he calculation is % diff = (CLEC result – Calculated Value)/Calculated Value." Using the numbers provided by Antonuk in the Final QPAP Report, would actually produce a 50% miss. (3-2)/2 = 0.50 or 50 percent.

[116] Final QPAP Report, p. 69.

monthly performance to itself. All parties recognize that severely poor Qwest performance to CLECs and the use of the per occurrence scheme can result in the number of payment occurrences exceeding the number of orders completed in a month. The issue is whether or not the payment occurrences should be capped at the number of CLEC orders. Qwest argues that they should be capped "to prevent the illogical result of CLECs being paid on more orders than they actually submitted."[117] AT&T argued that they should not because a cap "inappropriately protects Qwest from its own extremely poor and severe performance to CLECs."[118] The Final QPAP Report recognizes Z-Tel's argument that, "eliminating Qwest's truncation is necessary to make sure that, as the severity of Qwest's non-compliant performance increases, so will the financial consequences associated with it."[119] The CLEC's simple argument is that the worse the Qwest performance, the more Qwest should pay. Contrary to Qwest's protestations, there is nothing illogical about that argument.

Finally, the QPAP Final Report mentions that, "[n]otably, methods like those proposed in the QPAP here exist in other plans examined by the FCC."[120] It should also be noted that methods like those proposed by the CLECs exist in other plans examined by the FCC.[121]

[117] Qwest Multistate Reply Brief, p. 18.
[118] AT&T Reply Brief, p. 13.
[119] Final QPAP Report, p. 68.
[120] Final QPAP Report, p. 69.
[121] Final QPAP Report, p. 68.

V. SELF-EXECUTING MECHANISM

A. PAYMENT OF INTEREST

AT&T notes that Antonuk set the interest rate for Qwest payments at the prime interest rate.[122] Although this is not a substantial issue, the Utah Division of Public Utilities determined that the interest rate should be the cost of money for Qwest set in the Utah Commission's rate case. If the Commission has set such a rate, or if the legislature has set a statutory interest rate, AT&T believes that it is more appropriate to use that rate.

B. EFFECTIVE DATES

1. "Memory" at Initial Effective Date

Although AT&T advocated for pre-271 implementation of the QPAP, AT&T is in agreement with the resolution proposed by the Utah Division of Public Utilities Staff that Qwest be required to make the QPAP effective contemporaneous with the filing of its FCC application.[123] As Qwest is claiming compliance with the requirements of 271 when filing such application, there is no reason why the QPAP should not be implemented at that time.

In a stark contrast to the Utah Division of Public Utilities Staff, Antonuk's belief was because there are no special circumstances and other ILECs have not had to make such a proffer before getting 271 relief (without citation), Qwest should not have to.[124] This is from the same "consultant" who allowed the lowering of a payment cap to levels never before contemplated by the FCC and allowed Qwest to proffer an unprecedented

---

[122] Antonuk Report at p. 72-73.
[123] Exhibit A at p. 79.
[124] Antonuk Report at p. 75.

ILEC biased "offset," and limitations section. Accordingly, one should question the credibility of such a finding when he ignored FCC thresholds on other matters.

Antonuk further found that Qwest should be required to file *faux* reports pre-271 but when the QPAP was finally implemented, the data in those reports would be erased so that there would be no escalation of payments.[125] For example, if Qwest filed four months of substandard performance pre-QPAP, that slate would be wiped clean and it would be as if it were the first month of Qwest poor performance once the plan in implemented. This is an illogical, inexplicable and ILEC biased approach to the issue and should be reversed.

VI. OTHER ISSUES

A. PROHIBITING QPAP PAYMENT RECOVERY IN RATES

In the QPAP proceedings, both Qwest and AT&T agreed that Qwest should not recover the monies it expends through increasing its rates through its retail or wholesale customers.[126] However, Qwest Witness Inoyue indicated that he refused to put this section in the QPAP because he expected to see it in a state or FCC order because the FCC has instituted such requirement, and it is a state commission/FCC issue.[127] He agreed to proffer such language to the relevant commission.[128]

Even though Antonuk gave guidance on every other aspect of the plan Antonuk's ruling on this issue was "we believe that neither the FCC nor the state commissions

[125] Antonuk Report at p.75.
[126] *See* AT&T's Initial Brief at p.29.
[127] *Id.*
[128] *Id.*

require guidance in how or when to determine what to do about QPAP payment recovery in rates."[129]

As Antonuk felt restricted on this particular issue, AT&T petitions the Washington Commission to mandate that ratepayers should not pay for a failure of a BOC to provide adequate service quality to CLECs per an agreement among Qwest, AT&T and the FCC.[130] As the FCC further concluded that any attempt by a BOC to recover those fines through increased rates would "seriously undermine the incentive meant to be created by the Plan."[131] This is not just a matter of rate recovery, as Antonuk implies.

Accordingly, AT&T requests that the following FCC mandated language be added:

> 13.10 Any payments made by Qwest as a result of the PAP should not: 1) be included as expenses in any Qwest revenue requirement, or 2) be reflected in increased rates to CLECs for services and facilities provided pursuant to Section 251(c) of the Telecommunications Act of 1996 and priced pursuant to Section 252(d) of the Telecommunications Act of 1996.

VII. COMMENTS IN RESPONSE TO WASHINGTON COMMISSION'S OCTOBER 24, 2001 REQUEST

The Washington Utilities and Transportation Commission asked specific questions in its October 24, 2001 Notice of Opportunity to File Comments.

Regarding Question No. 1 related to differences in standards and payments between the QPAP and Washington rules, AT&T sees no reason why the collocation standards in WAC 480-120-560 should not apply to the QPAP. The Commission has addressed the issue and determined the appropriate standard and penalties for collocation.

---

[129] Antonuk Report at p. 86.
[130] FCC Bell Atlantic 271 Order at ¶ 443.
[131] *Id*.

There is no doubt that the Commission had the authority to do so. The Commission's standard can easily be incorporated. Such approach should be taken with any other Washington Rules that this Commission has or will contemplate that are in contrast with provisions found in the QPAP.

Regarding Question No. 2, AT&T notes that, as discussed above, it has advocated against any type of "hard" cap. To the extent that the Commission imposes such a cap, AT&T believes that the cap should correspond to the most recent ARMIS data.

Regarding Question No. 3, AT&T is in the process of doing an extensive review to determine if the provisions of the QPAP, as amended by the Report, are consistent with existing Washington SGAT and ICA provisions. The inconsistencies that AT&T has so far found are illustrative of problems that will occur if Qwest prevails on keeping its unprecedented restriction on other damage recovery found in QPAP § 13.6.

For example, as negotiated in SGAT §6.2.3, "Qwest further agrees to reimburse CLEC for credits or fines and penalties assessed against CLEC as a result of Qwest's failure to provide service to CLEC, subject to the understanding that any payments made pursuant to this provision will be offset and credit toward any other penalties voluntarily agreed to by Qwest…." However, QPAP § 13.6, the highly controversial QPAP section, excludes the CLEC from any contractual remedy not found in the QPAP. Accordingly, Qwest proffered negotiated terms in its SGAT that it later negated in its QPAP. Thus, in this example, the CLECs will not be able to recover from Qwest when the CLEC is levied fines by the Commission based on Qwest acts, a subject not measured in the QPAP.

Regarding SGAT §7.2.2.8.6, pursuant to the Commission's 15th Supplemental Order, Qwest is required to guarantee the availability of trunk groups for which CLECs pay a deposit.[132] The guarantee, as proposed by Qwest and AT&T calls for a payment for the CLEC when the guarantee is not met.[133] The language of QPAP § 13.6 also negates any such payment because it requires the CLEC to waive all causes of action based on a contractual theory of liability, while substantially restricting non-contractual causes of action to the point of negating them.

These problems are illustrative of what will occur with any CLEC claim in an interconnection agreement or SGAT relating to Qwest performance that is not measured by the QPAP because there is an absolute exclusion for CLEC claims of this type. Pursuant to SGAT §13.6, the CLEC would waive all contractual claims, as well as being effectively precluded from recovering on all non-contractual claims. AT&T believes that its approach in Section C above, regarding a complete revamping of SGAT Section §13.6 and adding additional language allowing a CLEC to pursue alternative remedies in the ICA or SGAT for claims not measured by the QPAP is warranted to remedy this situation.

Regarding Question No. 4, AT&T has no opinion on what Tier II funds should be used for as long as it does not directly or indirectly benefit Qwest in its provisioning of services. AT&T notes that the Commission will have substantial responsibilities under the QPAP. Accordingly, the monies could go for a special regulatory fund for the additional expenses estimated by the Commission if such purpose is allowed under Washington law.

---

[132] *See* SGAT § 7.2.2.8.6.1.

[133] AT&T and Qwest have not yet resolved the actual guarantee language. However, both parties have agreed to the payment concept.

AT&T has no position on Question No. 5. Regarding Question No. 6, AT&T sees no reason why the pick and choose principles contained in the Commission's Interpretive and Policy Statement in Docket UT-990355 should not apply to provisions of the QPAP. AT&T believes this would require Qwest to delete the sentence in §13.6 indicating "to elect the PAP, CLEC must adopt the PAP in its entirety, in its interconnection agreement with Qwest."

CONCLUSION

AT&T is seeking a performance assurance plan that adequately addresses the five factors articulated by the FCC, and essentially provides adequate incentive to prohibit Qwest from re-monopolizing the relevant market. AT&T has proffered numerous instances where it believes Antounuk has created his own standard of review, misconstrued or ignored relevant legal principles and ignored FCC precedent as well as the record. The Utah Department of Public Utilities Staff has already addressed many of the issues that AT&T has with the Antonuk report. There is also excellent guidance from the Colorado Public Utilities Commission and the FCC. Based on relevant precedent and findings, AT&T requests that the Washington Commission adopt the changes to the QPAP that AT&T requests.

Respectfully submitted this 21st day of November 2001.

AT&T COMMUNICATIONS OF THE OF THE PACIFIC NORTHWEST, INC., AND AT&T LOCAL SERVICES ON BEHALF OF TCG SEATTLE AND TCG OREGON

By: ______________________________

Mary B. Tribby
Rebecca B. DeCook
Steven H. Weigler
1875 Lawrence Street, Suite 1575
Denver, Colorado 80202